SUPREME COURT OF KENTUCKY
2014-SC-000549-D
(2013-CA-000612)

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF INSURANCE; AND
SHARON P. CLARK, IN HER OFFICIAL CAPACITY
AS COMMISSIONER OF THE KENTUCKY
DEPARTMENT OF INSURANCE — APPELLANTS

v.

UNITED INSURANCE COMPANY OF AMERICA;
THE RELIABLE INSURANCE COMPANY; AND
RESERVE INSURANCE COMPANY — APPELLEES

REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via U.S. mail on the following: Sheryl G. Snyder, Joe Ardery, Jason P. Renzelmann, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202, and Carol Lynn Thompson, Sidley Austin, LLP, 555 California Street, San Francisco, CA 94104, and Mark D. Hopson and Brian Morrissey, Sidley Austin LLP, 1501 K Street, N.W., Washington, DC 20005; and Scott Heyman, Sidley Austin LLP, One South Dearborn, Chicago, IL 60603, Counsel for Respondents; Virginia Hamilton Snell, Wyatt Tarrant & Combs LLC, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202 and Mark D. Overstreet, 421 West Main Street, P.O. Box 634, Frankfort, KY 40602-0634, Counsel for the Life Insurers Counsel and the National Alliance of Life Companies; Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 669 Chamberlin Ave., Frankfort, KY 40601, and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601on this the 23rd day of December, 2015.

Shaun T. Orme

REPLY POINTS AND AUTHORITIES

INTRODUCTION

This is the Reply to the Brief for Appellee and is to address only matters that deserve further comment. The Appellant's Brief addressed in detail the Court of Appeals' opinion reversing a trial court judgment upholding important social legislation as remedial, and not subject to prohibitions on retroactive application.

ARGUMENT

I. The Act Does Not Conflict with Existing Contracts.

In the very first paragraph of their brief, Appellees misstate the terms of their policies in an effort to add in a non-existent right. They argue, "If these new requirements are enforced retroactively against life insurance policies issued before the Act's effective date, it will eliminate Appellees' express *contractual right to require* their 'receipt' of 'due proof of death' from a claimant *before taking steps to investigate* potential deaths or to pay claims." There is no right to "proof of death" before investigation of a claim. Proof of death is a condition for payment *not* investigation. The policies merely provide, "We will pay, upon receipt of due proof of death...." [Brief for Appellants, Apdx. 4] In fact, the policies are silent as to when potential claims should be investigated, the insurers have a history of investigating potential claims upon *notice* of death from "any source", and the statute expressly requires and reinforces the insurers' right to "due proof of death" *before payment* under the policy. KRS 304.15-420(3)(b)(2b).

The misstatements continue on page 5 of Appellee's brief where it is posited that "The Act fundamentally alters the relationship between insurer and policyholder reflected in existing contracts." Notice is not part of the relationship between insurer and policy

holders, therefore it is not "reflected" in existing contracts. If notice were the required evidence for payment of benefits, there would be no need for the proof of death. Proof of death is literally the evidence, because proof and evidence are synonyms. Notice is not. Notice is merely a mechanism to begin the process of review. Although it is obvious that notice and proof of death have no legal nor definitional commonality, Appellees continue to swap one for the other throughout their brief in an attempt to mask the immutable and inconvenient truth: notice is not a bargained for term in their policies and the burden of proof of death remains that of the beneficiaries.

The Act is about current, in force policies, with no conflict in existing contracts. These are policies upon which insurers are still collecting premiums or have converted to *extended term* or *reduced paid-up*, and upon which the insurers are still investing and enjoying interest. Appellees repeat their mantra that checking the *Death Master File* for all in force policies creates a "substantive" effect on past transactions under *Hamilton v. Desparado Fuels, Inc,* 868 S.W.2d 95 (KY 1993) but this is an impossibility because notice was not a contracted term and any cost associated with the implementation of checking the Death Master File is explicitly not to be passed on to the policies under the Act. A substantive right would be a change in the payout amount. The Act does not shift the contractual responsibility to establish proof of death to the insurers. It is also clearly a misstatement to say the Act forces Appellees to make payment before they receive proof of death (Appellees' Br. pg. 15) Appellees' attack and argument are belied by the trial court's sound reasoning that: "The statute does not require the insurance companies to complete the claims process, despite Plaintiffs' argument to the contrary. The statute is

narrowly tailored to give notice to potential beneficiaries, but leaves intact the contractual burden of proving death....the claimants must still file a proof of death."[i]

While the presumption against retroactivity is well-recognized, there is another presumption well-recognized in Kentucky law that is the more accurate lens for viewing the Appellees' assertion that the Act affects a contractual right. It is the presumption that the terms, statements and obligations of contracts are held within the four corners of the document. It is an established rule in this Commonwealth that "[i]n the absence of ambiguity, a written instrument will be enforced strictly according to its terms," and a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003)(quoting *O'Bryan v. Massey–Ferguson, Inc.,* 413 S.W.2d 891, 893 (Ky. 1966); citing *Hoheimer v. Hoheimer,* 30 S.W.3d 176, 178 Ky. 2000)). "Even if the contracting parties may have intended a different result, a contract cannot be interpreted contrary to the plain meaning of its terms." *Cadleway Prop., Inc. v. Bayview Loan Serv., LLC*, 338 S.W.3d 280, 286 (Ky. App. 2010) (citing *Abney v. Nationwide Mut. Ins. Co.,* 215 S.W.3d 699, 703 (Ky. 2006)).

It is not the Department who seeks to alter the terms of pre-existing policies, but the insurers, by attempting to decide terms and "rights" to notice they failed to negotiate and address in *their* policies. Were it truly substantive and a right to decline to use the *Death Master File*, the insurers were clearly the entities to have recognized such a "right" or the potential burden that being a source of notice might cause for them. They could have drafted their policies to prevent them from ever being a source of notice, or drafted that notice to initiate a claim could only come from external sources, or better yet, only

from potential beneficiaries. However, Appellees readily admitted notice might come from them. There is no "fundamental" alteration of Appellees' contractual obligation because notice is not a fundament of the contract, were it so, Appellees would surely quote the language.

II. Appellees Cannot Demonstrate Significant Financial Costs Related to the Act.

Appellees admit that historically they only captured the name of the beneficiary, (without location) and estimated the birth date (Depo. Myers, pp.16, 88.) Inadequate bookkeeping does not entitle Appellees to conjure a substantive right where there is none for notice, nor recoup costs for such haphazard records.

The Appellees have also failed to show that the costs of fulfilling the Act's requirement for all in force policies are significant. Appellees have admitted that the process by which Appellees investigate the claim is the same, whether notice comes from a beneficiary, another source, or the insurers themselves. (Depo. Schallhorn, pp. 143-146), the arguments that the Act will somehow alter standard practices or broaden the Appellees' responsibilities, is belied by admissions of standard practices in the Appellees' answers to interrogatories. In response to Interrogatory No. 10, the Appellees state in part[ii]:

> In those cases where United has received valid proof of death and has made payment, the claims adjuster also will initiate an *alpha search* on all in-force or terminated policies on Life 70[iii] to determine whether United has issued another life insurance policy covering the insured or whether another policy exists through business acquired from another company. If United determines that it or some other Kemper Home Services company has issued or acquired a life insurance policy covering the insured, then the policy will be sent through the claims adjustment process to identify and contact the beneficiary and pay the claim.

In essence, Appellees with their alpha search are already implementing the entire process required by the Act. With the exception of requiring that the name of a potential insured come from the *Death Master File*, all of the other elements of the statute are satisfied, including keeping the obligation on the beneficiary to furnish proof of the claim with a certified death certificate. The Court should also take notice that an alphabetical compilation of all deaths in Kentucky is published annually as a public record. KRS 213.131(3). Appellees cannot argue straight-faced that while they concede they are currently checking new policies, a substantive financial effect is created by running the existing insureds through the *Death Master File* as well.

Compliance with the Act then, really does not create a new or onerous burden. This means the only thing Appellees are included in this "administrative cost" calculation is using the *Death Master File* itself, which is explicitly forbidden to ever be included in the cost of the policies: "An insurer shall not charge insureds, account holders, or beneficiaries for any fees or costs associated with a search or verification conducted pursuant to this section." KRS 304.15-420(4). Appellees must not be permitted to in essence recoup this cost by refusing to comply with the Act regarding the policies in force when the Act became effective.

Appellees mischaracterize *American Express Travel Related v. Kentucky*, 730 F. 3d 628 (6th Cir. 2013) case. In that case the statute actually amended the escheat law. The Act only created the requirement to *look* at the *Death Master File* and *then* if the beneficiaries cannot be found, it escheats to the state as provided for in the escheat statute. For all the discussion and repetition by Appellees' about proof of death, they are incapable of offering how notice equates to proof. The Act does not compel Appellees to

make payment sooner than the contracts require; no contract is paid before the ***beneficiaries provide due proof of death.*** The Act merely requires that the Appellees pay a covered loss when the event insured against, death, occurs during the life of the policy. In this way the insured gets what he/she bargained for and a windfall to the Appellees, at the expense of the beneficiary, is avoided.

CONCLUSION

For all of the reasons argued in the Brief and in this Reply, the circuit court correctly reasoned that KRS 304.15-420 is remedial and intended to be applied to all outstanding life policies. The Court of Appeals should be reversed with reinstatement of the circuit court judgment.

Respectfully submitted,

Counsel for Appellees Commonwealth of Kentucky, Department of Insurance and Sharon P. Clark, Commissioner Department of Insurance.